

**Case No. D16/22**

**Salaries tax** – whether an employment income arose in or was derived from Hong Kong – gain on share option – Hong Kong sourced vs non-Hong Kong sourced employment – vesting period – services rendered in Hong Kong during non-Hong Kong sourced employment – time apportionment basis – sections 8, 8(1), 8(1A)(a), 8(1A)(b)(ii), 8(1A)(c), 8(1B), 9, 8(2D), 68(4) of the Inland Revenue Ordinance (the ‘IRO’)

Panel: Anson Wong SC (chairman), Ching Wai Han Claudia and Lee Kwong Man.

Date of hearing: 28 October 2020.

Date of decision: 15 November 2022.

Mr A (the ‘Taxpayer’) used to work at Country B for Company C (‘Company C-Country B’), which was a company with the group (the ‘Group’) ultimately held by Company C, a public limited company registered in the Country D. The Taxpayer commenced his employment with Company C-Country B on 1 February 2008.

By an award certificate dated 11 March 2009, the Taxpayer was awarded under the Deferred Restricted Share Scheme (the ‘Scheme’) a nil price option to acquire ordinary shares in Company C (the ‘2009 Option’). Subject to the terms and conditions set out in the rules of the Scheme (the ‘Scheme Rules’), the Taxpayer would be able to exercise 50% of the 2009 Option from 11 March 2011 and 100%, or the balance, of the 2009 Option between 11 March 2012 and 11 March 2016.

By a letter dated 13 October 2009, Company C (Hong Kong) Limited (‘Company C-HK’) confirmed that the Taxpayer would be assigned to Hong Kong for a short-term assignment. However, the Taxpayer was only assigned by Company C-Country B to work in Hong Kong from 10 December 2009.

By another award certificate dated 11 March 2010, the Taxpayer was awarded under the Scheme a nil price option to acquire ordinary shares in Company C (the ‘2010 Option’). Subject to the Scheme Rules, the Taxpayer would be able to exercise 50% of the 2010 Option from 11 March 2012 and 100%, or the balance, of the 2010 Option between 11 March 2013 and 11 March 2017.

Under an employment letter dated 22 March 2010, the Taxpayer confirmed that his employment with Company C-HK started on 15 March 2010. During his employment with Company C-HK, he would work at Company C-HK’s office in Hong Kong and might be required to travel abroad to work for any company within the Group.

On 25 October 2010, the Taxpayer was notified that his employment with Company C-HK would be terminated by reason of redundancy and he was put on garden

leave. Subsequently, by a letter dated 19 January 2011, Company C-HK informed the Taxpayer that his employment would be terminated by reason of redundancy with effect from 25 January 2011.

On 28 January 2011, the Taxpayer exercised the 2009 Option and made a gain of HK\$3,884,448 ('Sum A'). On 21 March 2011, the Taxpayer exercised the 2010 Option and made a gain of HK\$1,343,092 ('Sum B').

The Revenue's assessor assessed that out of the gains arising from the exercise of the Options, a sum of HK\$3,451,353 should be chargeable to Salaries Tax and the Subject Assessment should be revised accordingly. The Taxpayer objected to the said assessment. In his Determination dated 29 May 2020 (the 'Determination'), the Deputy Commissioner of Inland Revenue ('DCIR') rejected the Taxpayer's objection. This was the appeal of the Taxpayer against the Salaries Tax assessment raised on him for the year of assessment 2010/11 in respect of his gain arising from the exercise of certain share options (the 'Subject Assessment').

Due to the outbreak of Covid-19, the Taxpayer who at all material times resided in Country B was unable to attend the hearing of the appeal proper. Having considered all the circumstances, the Board decided to exercise its power under section 68(2D) of the IRO to proceed to hear the appeal in the absence of the Taxpayer or his authorized representatives.

**Held:**

1. The basic charge of Salaries Tax was imposed on '*income arising in or derived from Hong Kong from any employment*', section 8(1) of the IRO, and the focus was on the locality of the employment. Once a taxpayer's salary fell within the basic charge, there was no provision for apportionment, subject only to any claim for relief (a) under section 8(1A)(b)(ii), as read with section 8(1B); or (b) under section 8(1A)(c). (CIR v George Andrew Goepfert (1987) 2 HKTC 210, and CIR v Lo Wa Ming Patrick [2021] 2 HKLRD 522 followed).
2. Starting from 15 March 2010, the Taxpayer was under a Hong Kong employment with Company C-HK. At the time when the Taxpayer left his non-Hong Kong employment with Company C-Country B and started his Hong Kong-employment with Company C-HK (ie 15 March 2010), the Taxpayer had no entitlement to exercise the 2009 Option. 100% of the Options became vested in the Taxpayer when he left his Hong Kong-employment with Company C-HK on 24 January 2011. The vesting of the Options did not merely arise from the Taxpayer's services rendered under his non-Hong Kong employment, but was also attributable to his services rendered under his Hong Kong employment. Without his Hong Kong employment, the Options would not have become vested and exercisable by the Taxpayer. The Board took the view that the gains were attributable to the services rendered by the Taxpayer under both non-Hong Kong employment

with Company C-Country B and Hong Kong employment with Company C-HK during the relevant vesting period (D32/04 19 IRBRD 253 followed).

3. Sum A and Sum B should be apportioned in the circumstances of this case. First, in relation to the Taxpayer's non-Hong Kong employment, the Taxpayer had not argued that the number of days which he spent in Hong Kong during such employment were for purposes not related to his rendering services in Hong Kong. Accordingly, the Revenue was justified to do the apportionment based on the number of days which the Taxpayer was physically within Hong Kong as shown by the immigration record. Second, in relation to the Taxpayer's Hong Kong employment, the fact that he was away from Hong Kong for garden leave from 25 October 2010 until the termination of his Hong Kong employment on 24 January 2011 was irrelevant. In the present case, the exemption under section 8(1A)(b)(ii), as read with section 8(1B), was plainly not engaged. There was no dispute that during the course of his Hong Kong employment with Company C-HK, the Taxpayer had rendered services on more than 60 days in Hong Kong during the relevant period.
4. In relation to the 2009 Option, there were a total of 685 days in the vesting period between 11 March 2009 and 24 January 2011. For such part of the vesting period which was attributable to the Taxpayer's non-Hong Kong employment with Company C-Country B, the immigration records showed that the Taxpayer had spent 58 days in Hong Kong. As to such part of the vesting period which was attributable to the Taxpayer's Hong Kong employment, there were a total of 316 days. It followed that the portion of Sum A that was chargeable to Salaries Tax should be HK\$2,120,852.
5. In a similar vein, the portion of Sum B that was chargeable to Salaries Tax should be HK\$1,330,501. The Board agreed with the Revenue's assessment that the taxable portion of the gains derived from the exercise of the Options was HK\$3,451,353.
6. There was no evidence before the Board to show that the Taxpayer had rendered services in Country B for Company C-HK during the period of his Hong Kong employment. The Taxpayer had failed to satisfy the essential requirement for section 8(1A)(c) exemption that such portions of Sum A chargeable to Salaries Tax were derived from services rendered in Country B. Hence, the Taxpayer was not qualified for exemption under section 8(1A)(c). (D34/01 16 IRBRD 303 followed)
7. The Taxpayer had failed to discharge his burden of showing that the Subject Assessment was exercise or incorrect under IRO section 68(4).

**Appeal dismissed.**

Cases referred to:

Commissioner of Inland Revenue v. George Andrew Goepfert (1987) 2 HKTC 210  
Commissioner of Inland Revenue v. Lo Wa Ming Patrick [2021] 2 HKLRD 522  
D32/04, IRBRD, vol 19, 253  
D34/01, IRBRD, vol 16, 303

Appellant in absentia.

Leung Hoi Sze and Lo Hok Leung Dickson, for the Commissioner of Inland Revenue.

**Decision:**

**A. INTRODUCTION**

1. This is the appeal of Mr A (the ‘**Taxpayer**’) against the Salaries Tax assessment raised on him for the year of assessment 2010/11 in respect of his gain arising from the exercise of certain share options (the ‘**Subject Assessment**’).
2. The background giving rise to this appeal are set out below.

**B. FACTUAL BACKGROUND**

3. The Taxpayer used to work at Country B for Company C (‘**Company C - Country B**’), which is a company with the group (the ‘**Group**’) ultimately held by Company C, a public limited company registered in the Country D. The Taxpayer commenced his employment with Company C-Country B on 1 February 2008.
4. By an award certificate dated 11 March 2009 (the ‘**2009 Award Certificate**’), the Taxpayer was awarded under the Deferred Restricted Share Scheme (the ‘**Scheme**’) a nil price option to acquire 19,578 ordinary shares in Company C (the ‘**2009 Option**’). Subject to the terms and conditions set out in the rules of the Scheme (the ‘**Scheme Rules**’), the Taxpayer would be able to exercise 50% of the 2009 Option from 11 March 2011 and 100%, or the balance, of the 2009 Option between 11 March 2012 and 11 March 2016.
5. By a letter dated 13 October 2019 (the ‘**Assignment Letter**’), Company C (Hong Kong) Limited (‘**Company C-HK**’) confirmed that the Taxpayer would be assigned to Hong Kong for a short-term assignment.
6. It was stated in the Assignment Letter that the Taxpayer’s home country was Country B and that he would be assigned to Hong Kong with effect from 1 November 2019 for a duration not exceeding 3 months. However, as a matter of fact, the Taxpayer was only assigned by Company C-Country B to work in Hong Kong from 10 December 2019.

7. By another award certificate dated 11 March 2010 (the '**2010 Award Certificate**'), the Taxpayer was awarded under the Scheme a nil price option to acquire 13,220 ordinary shares in Company C (the '**2010 Option**'). Subject to the Scheme Rules, the Taxpayer would be able to exercise 50% of the 2010 Option from 11 March 2012 and 100%, or the balance, of the 2010 Option between 11 March 2013 and 11 March 2017.

8. By a letter dated 22 March 2010 issued by Company C-HK and countersigned by the Taxpayer (the '**Employment Letter**'), the Taxpayer was employed by Company C-HK in the position of Position E, FX Options in the Global Markets, Wholesale Banking Division.

9. Under the Employment Letter, the Taxpayer confirmed that his employment with Company C-HK started on 15 March 2010. During his employment with Company C-HK, he would work at Company C-HK's office in Hong Kong and might be required to travel abroad to work for any company within the group.

10. On 25 October 2010, the Taxpayer was notified that his employment with Company C-HK would be terminated by reason of redundancy and he was put on garden leave. Subsequently, by a letter dated 19 January 2011, Company C-HK informed the Taxpayer that his employment would be terminated by reason of redundancy with effect from 25 January 2011.

11. On 28 January 2011, the Taxpayer exercised the 2009 Option and made a gain of HK\$3,884,448 ('**Sum A**').

12. On 21 March 2011, the Taxpayer exercised the 2010 Option and made a gain of HK\$1,343,092 ('**Sum B**').

### **C. THE DETERMINATION**

13. The Revenue's assessor assessed that out of the gains arising from the exercise of the Options, a sum of HK\$3,451,353 should be chargeable to Salaries Tax and the Subject Assessment should be revised accordingly.

14. The Taxpayer objected to the said assessment. The issue arising from his objection is whether any part of the gains made by him from his exercise of the 2009 Option and the 2010 Option (collectively, the '**Options**') are exempted from Salaries Tax in the Subject Assessment.

15. In his Determination dated 29 May 2020 (the '**Determination**'), the Deputy Commissioner of Inland Revenue ('**DCIR**') rejected the Taxpayer's objection. He held that although the Options were granted to the Taxpayer during his employment with Company C-Country B, both of them were attributable to his services rendered for Company C-Country B as well as for Company C-HK since it was his continued employment with Company C-HK which gave him the entitlement to exercise the Options and, hence, to make the gains.

16. In relation to Sum A (which represents the gain made out of the exercise of the 2009 Option) and Sum B (which represents the gain made out of the exercise of the 2010 Option), DCIR held that only such portion of the gains attributable to his services rendered *in Hong Kong during his employment with Company C-Country B and during his employment with Company C-HK* should be chargeable to Salaries Tax.

17. In respect of the Taxpayer's objection based on the assertion that he had paid tax in Country B in respect of Sum A (which represents the gain made out of the exercise of the 2009 Option), DCIR rejected such objection on the further ground that the Taxpayer had failed to substantiate that he had paid any tax in Country B in respect of Sum A.

#### **D. GROUNDS OF APPEAL**

18. In this appeal, the Taxpayer raises various points in his Notice of Appeal issued by himself on 22 June 2022. Those points can be broadly summarized as follows:-

- (1) The 2009 Option was granted on 11 March 2009 as part of his performance bonus for the year 2008. Further, the vesting of the shares under the Option was a form of retrenchment payment and it represented past income that was sourced in Country B. Hence, the gains made out of the exercise of the Options were income sourced from his employment with Company C-Country B or in Country B;
- (2) The gains made by him from the Options mostly related to works rendered by him in Country B. Particularly, during his employment with Company C-HK, he only worked in Hong Kong for the period from March 2010 to October 2010 and was away from Hong Kong for garden leave from 25 October 2010 until the termination of his employment with Company C-HK on 24 January 2011; and
- (3) Sum A was taxed in Country B and there was double-taxation.

19. Due to the outbreak of Covid-19, the Taxpayer who at all material times resided in Country B was unable to attend the hearing of the appeal proper. In his email dated 16 July 2020, the Taxpayer suggested that the appeal could proceed without his presence. Having considered all the circumstances, we decided to exercise its power under section 68(2D) of the Inland Revenue Ordinance, Chapter 112 ('IRO') to proceed to hear the appeal in the absence of the Taxpayer or his authorized representatives.

#### **E. DISCUSSIONS**

##### ***E1. Relevant Statutory Provisions and Legal Principles***

20. IRO section 8 provides, so far as material, that:-

- (1) *Salaries tax shall, subject to the provisions of this Ordinance, be*

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*charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources—*

*(a) any office or employment of profit; and*

...

*(1A) For the purposes of this Part, income arising in or derived from Hong Kong from any employment—*

*(a) includes, without in any way limiting the meaning of the expression and subject to paragraph (b), all income derived from services rendered in Hong Kong including leave pay attributable to such services;*

*(b) ... excludes income derived from services rendered by a person who—*

...

*(ii) renders outside Hong Kong all the services in connection with his employment; and*

*(c) ... excludes income derived by a person from services rendered by him in any territory outside Hong Kong where—*

*(i) by the laws of the territory where the services are rendered, the income is chargeable to tax of substantially the same nature as salaries tax under this Ordinance; and*

*(ii) the Commissioner is satisfied that that person has, by deduction or otherwise, paid tax of that nature in that territory in respect of the income.*

...

*(1B) In determining whether or not all services are rendered outside Hong Kong for the purposes of subsection (1A) no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period for the year of assessment.*

21. IRO section 9 provides, so far as material, that:-

*(1) Income from any office or employment includes—*

...

*(d) any gain realized by the exercise of, or by the assignment or release of, a right to acquire shares or stock in a corporation obtained by a person as the holder of an office in or an employee of that or any other corporation.*

...

*(4) For the purposes of subsection (1)—*

*(a) the gain realized by the exercise at any time of such a right as is referred to in paragraph (d) of that subsection shall be taken to be the difference between the amount which a person might reasonably expect to obtain from a sale in the open market at*

*that time of the shares or stock acquired and the amount or value of the consideration given whether for them or for the grant of the right or for both ...*

22. As observed by MacDougall J in CIR v. George Andrew Goepfert (1987) 2 HKTC 210 and further elaborated by K Yeung J in CIR v. Lo Wa Ming Patrick [2021] 2 HKLRD 522 (at paragraph 4)<sup>1</sup>, the broad structure of IRO section 8 and the charges it imposes can be summarized as follows:-

- (1) The basic charge of Salaries Tax is imposed by section 8(1). It is imposed on ‘*income arising in or derived from Hong Kong from any employment*’;
- (2) Once a taxpayer’s salary falls within the basic charge, there is no provision for apportionment. The entire salary is subject to Salaries Tax wherever his services may have been rendered, subject only to any claim for relief:-
  - (a) under section 8(1A)(b)(ii)<sup>2</sup>, as read with section 8(1B)<sup>3</sup>; or
  - (b) under section 8(1A)(c)<sup>4</sup>;
- (3) Section 8(1A)(a) is an extension of the basic charge. The extension focuses on the location where the services are provided. It catches income ‘*derived from services rendered in Hong Kong*’, irrespective of whether it is ‘*income arising in or derived from Hong Kong from any employment*’

23. In relation to the basic charge under section 8(1), the focus is on the locality of the employment, but not the locality where the services of the employee are actually rendered. As observed in CIR v. George Andrew Goepfert (*supra*), ‘*in case of an employment, the locality of the source of income is not the place where the activities of the employees are exercised, but the place either where the contract for payment is deemed to have a locality or where the payments for the employments are made*’ (at 235). ‘*It follows that the place where the services are rendered is not relevant to the enquiry under s.8 (1) as to whether income arises in or derived from Hong Kong from any employment. It should therefore be completely ignored.*’ (at p.236)

24. Bearing in mind the above principles, we will proceed to consider the three issues raised by the Taxpayer in his Notice of Appeal.

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<sup>1</sup> Although the decision of K Yeung J was overturned on appeal (*see* [2022] HKCA 710), the decision of the Court of Appeal only turns on the formula that should be adopted for apportioning income derived from services rendered outside Hong Kong during a Hong Kong employment. The correctness of the broad legal effect of IRO section 8 as summarized by K Yeung J was not under challenge.

<sup>2</sup> ie the exclusion of income derived from services rendered by the taxpayer who renders outside Hong Kong all the services in connection with his employment.

<sup>3</sup> ie the so-called ‘60 days rule’, that no account shall be taken of services rendered in Hong Kong during visits not exceeding a total of 60 days in the basis period.

<sup>4</sup> ie the exclusion of income derived from services rendered outside Hong Kong, and the satisfaction of sections 8(1A)(c)(i) and (ii)

***E2. Issue 1: Source of the Gains Deriving from the Options***

25. The first issue concerns the source of the gains forming the subject matter of this appeal.

26. There is no dispute that before 15 March 2010, the Taxpayer was under a non-Hong Kong employment by Company C-Country B. However, with effect from 15 March 2010, the Taxpayer was employed by the Company C-HK.

27. In relation to the Taxpayer's employment with Company C-HK, the Employment Letter provided that the Taxpayer would primarily work in Hong Kong, his employment under the Employment Letter should be interpreted in accordance with Hong Kong law, and that he would need to comply, amongst other things, the Hong Kong Compliance Manual. Thus, it is clear that starting from 15 March 2010, the Taxpayer was under a Hong Kong employment with Company C-HK.

28. It is true that the grant of the 2009 Option on 11 March 2009 and the 2010 Option on 11 March 2010 took place at the time when the Taxpayer was still under his non-Hong Kong employment with Company C-Country B. However, in order to determine the source of the gains arising from the Options, it is necessary to take into account the following matters.

29. Pursuant to the 2009 Award Certificate, only 50% of the 2009 Option was exercisable by the Taxpayer from 11 March 2011 and the balance was only exercisable after 11 March 2012. Similarly, pursuant to the 2010 Award Certificate, only 50% of the 2010 Option was exercisable by the Taxpayer from 11 March 2012 and the balance was only exercisable after 11 March 2013. In other words, at the time when the Taxpayer left his non-Hong Kong employment with Company C-Country B and started his Hong Kong-employment with Company C-HK (ie 15 March 2010), the Taxpayer had no entitlement to exercise the Option.

30. Pursuant to Clause 4.4.1 of the Scheme Rules, if any participant in the Scheme ceased to be an employee of a company with the Group by reason of redundancy, his share option may be exercised within the exercise period. In a letter dated 20 June 2018 from Company C-HK, Company C-HK confirmed that the Taxpayer was an eligible leaver and was given the right to exercise the Options within 12 months from the termination of his employment. In other words, 100% of the Options became vested in the Taxpayer when he left his Hong Kong-employment with Company C-HK on 24 January 2011.

31. In this regard, it is instructive to consider the Board of Review's decision in D32/04 19 IRBRD 253. In that case, the taxpayer whilst having his non-Hong Kong employment with Company C was granted an option which would be vested him over a period of 5 years from the date of grant. Before the option was fully vested, his employment was changed to a Hong Kong employment with Company B. At paragraph 42 of the decision, the Board of Review held that:-

*‘... upon the termination of the Taxpayer’s employment with Company C, only 20% and not 100% of the option granted to the Taxpayer became vested and exercisable by the Taxpayer ... Thus, if it was not for the Taxpayer’s employment with Company B ... the Taxpayer would not have been entitled to exercise the remaining of the 100% of the share options after the termination of his employment with Company C. Consequently, we do not accept that the Taxpayer’s share option gain wholly derived from his employment with Company C ...’*

32. In light of the circumstances of this case, it is clear that the vesting of the Options did not merely arise from the Taxpayer’s services rendered under his non-Hong Kong employment, but was also attributable to his services rendered under his Hong Kong employment. Without his Hong Kong employment, the Options would not have become vested and exercisable by the Taxpayer. Hence, we do not accept the Taxpayer’s argument the gains arising from the exercise of the Options were wholly derived from his non-Hong Kong employment. Rather, we take the view that the gains were attributable to the services rendered by the Taxpayer under both non-Hong Kong employment with Company C-Country B and Hong Kong employment with Company C-HK during the relevant vesting period.

### ***E3. Issue 2: Question of Apportionment***

33. The second issue concerns the apportionment of the gains made by the Taxpayer from his exercise of the Options.

34. The Revenue accepted that the gains arising from the exercise of the Options have to be apportioned between the two employments over the respective vesting periods.

35. In relation to the 2009 Option, the Revenue submitted that the vesting period was from the grant date of 11 March 2009 to the termination date of the Taxpayer’s employment with Company C-HK on 24 January 2011. Based on such vesting period, the Revenue submitted that Sum A, which represents the gains arising from the exercise of the 2009 Option should be apportioned as follows:-

- (1) With regard to the portion of Sum A relating to the period during the Taxpayer’s non-Hong Kong employment (ie 11 March 2009 to 14 March 2010), only such part of such portion which was attributable to the days of services rendered by him in Hong Kong should be assessable to Salaries Tax pursuant to IRO section 8(1)(a) and section 8(1A)(a);
- (2) With regard to the remaining portion of Sum A relating to the period during the Taxpayer’s Hong Kong employment (ie 15 March 2010 to 24 January 2011), the entire portion should be fully chargeable to Salaries Tax under IRO section 8(1)(a).

36. In relation to the 2010 Option, the Revenue submitted that the vesting period

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was from the grant date of 11 March 2010 to the termination date of the Taxpayer's employment with Company C-HK on 24 January 2011. Based on such vesting period, the Revenue submitted that Sum B, which represents the gains arising from the exercise of the 2010 Option should be apportioned as follows:-

- (1) With regard to the portion of Sum B relating to the period during the Taxpayer's non-Hong Kong employment (ie 11 March 2010 to 14 March 2010), only such part of such portion which was attributable to the days of services rendered by him in Hong Kong should be assessable to Salaries Tax pursuant to IRO section 8(1)(a) and section 8(1A)(a);
- (2) With regard to the remaining portion of Sum B relating to the period during the Taxpayer's Hong Kong employment (ie 15 March 2010 to 24 January 2011), the entire portion should be fully chargeable to Salaries Tax under IRO section 8(1)(a).

37. We accept the Revenue's submissions on how Sum A and Sum B should be apportioned in the circumstances of this case. In our judgment, the approach adopted by the Revenue is consistent with the legal effect of IRO section 8 as discussed in the authorities referred to in paragraphs 22 to 23 above.

38. We in particular would like to point out that the following matters:-

- (1) First, in relation to the Taxpayer's non-Hong Kong employment, the Taxpayer had not argued that the number of days which he spent in Hong Kong during such employment were for purposes not related to his rendering services in Hong Kong. Accordingly, the Revenue is justified to do the apportionment based on the number of days which the Taxpayer was physically within Hong Kong as shown by the immigration record.
- (2) Second, in relation to the Taxpayer's Hong Kong employment, the fact that he was away from Hong Kong for garden leave from 25 October 2010 until the termination of his Hong Kong employment on 24 January 2011 is irrelevant. Save for the exemptions provided in section 8(1A)(b)(ii) as read with section 8(1B) or section 8(1A)(c), all income derived from a Hong Kong employment is chargeable to Salaries Tax irrespective of whether the services were rendered in or outside Hong Kong. *A fortiori*, such income or gain attributable to garden leave relating to a Hong Kong employment must be taxable even though the employee chose to spend time during his garden leave outside Hong Kong. In the present case, the exemption under section 8(1A)(b)(ii), as read with section 8(1B), is plainly not engaged. There is no dispute that during the course of his Hong Kong employment with Company C-HK, the Taxpayer had rendered services on more than 60 days in Hong King during the relevant

period. Further, for the reason which we will further elaborate in Section E4 below, the exemption under section 8(1A)(c) is also not engaged. Since neither of the exemptions is engaged, the gains attributable to the Taxpayer's Hong Kong employment should be fully chargeable to Salaries Tax without any apportionment.

39. As far as computation is concerned, in relation to the 2009 Option, there were a total of **685 days** in the vesting period between 11 March 2009 and 24 January 2011. For such part of the vesting period which was attributable to the Taxpayer's non-Hong Kong employment with Company C-Country B (ie 11 March 2009 to 14 March 2010), the immigration records show that the Taxpayer had spent **58 days** in Hong Kong. As to such part of the vesting period which was attributable to the Taxpayer's Hong Kong employment (ie 15 March 2010 to 24 January 2011), there were a total of **316 days**. It follows that the portion of **Sum A** that is chargeable to Salaries Tax should be computed as follows:-

$$\text{HK\$3,884,448} \quad \times \quad \frac{(58 + 316) \text{ days}}{685 \text{ days}} = \frac{\text{HK\$2,120,852}}{\underline{\hspace{2cm}}}$$

40. In relation to the 2010 Option, there were a total of **320 days** in the vesting period between 11 March 2010 and 24 January 2011. For such part of the vesting period which was attributable to the Taxpayer's non-Hong Kong employment with Company C-Country B (ie 11 March 2010 to 14 March 2010), the immigration records show that the Taxpayer had only spent **1 day** in Hong Kong. As to such part of the vesting period which was attributable to the Taxpayer's Hong Kong employment (ie 15 March 2010 to 24 January 2011), there were a total of **316 days**. It follows that the portion of **Sum B** that is chargeable to Salaries Tax should be computed as follows:-

$$\text{HK\$1,343,092} \quad \times \quad \frac{(1 + 316) \text{ days}}{320} = \frac{\text{HK\$1,330,501}}{\underline{\hspace{2cm}}}$$

41. Based on the above computation, we agree with the Revenue's assessment that the taxable portion of the gains derived from the exercise of the Options is HK\$3,451,353 (ie HK\$2,120,852 + HK\$1,330,501).

***E4. Issue 3: Exemption under IRO section 8(1A)(c) and Double Taxation***

42. As held by the Board of Review's decision in D34/01 16 IRBRD 303, to qualify for exemption under section 8(1A)(c), three requirements would have to be satisfied by the Taxpayer:-

- (1) The Taxpayer's income was derived from services rendered overseas;
- (2) The income was by the law of that overseas territory chargeable to tax of substantially the same nature as salaries tax; and
- (3) The Revenue is satisfied that that person has paid tax of that nature in that territory in respect of the income.

43. The Taxpayer argued that he had paid tax in Country B in respect of Sum A, which represents the gains made by him out of the exercise of the 2009 Option, and that the same should not be taxable in Hong Kong.

44. In the Determination, the DCIR rejected the Taxpayer's argument primarily on the basis that the Taxpayer had then failed to show that he had paid the tax in Country B in relation to Sum A. In this appeal, the Taxpayer had adduced evidence that he had paid such tax and the Revenue fairly accepted that the Sum A was chargeable to tax in Country B in nature similar to our Salaries Tax and such tax had been paid.

45. However, the Revenue contended that the exemption under section 8(1A)(c) is still not engaged since the Appellant had still failed to discharge the burden of showing that the taxable portions of Sum A in Hong Kong were derived from services rendered outside Hong Kong.

46. As explained in paragraphs 35(1) and 36(1) above, in relation to such portion of Sum A attributable to the Taxpayer's non-Hong Kong employment, only such part of such portion which was attributable to the days of services rendered by him in Hong Kong is chargeable to Salaries Tax. Plainly, such part was not income derived from services rendered overseas.

47. In relation to such portion of Sum A attributable to the Taxpayer's Hong Kong employment, the Taxpayer claimed in his Notice of Appeal (at paragraph 10-11) that he only worked in Hong Kong for the period from 15 March 2010 to 24 October 2010 and had mostly been back to Country B during weekends and on leave days during that period. With regard to his garden leave from 25 October 2010 to 24 January 2011, the Taxpayer claimed that he was away from Hong Kong. Before us, there is no evidence to show that the Appellant had rendered services in Country B for Company C-HK during the period of his Hong Kong employment between 15 March 2010 to 24 January 2011.

48. In the circumstances, we accept the Revenue's submission that the Taxpayer has failed to satisfy the essential requirement for section 8(1A)(c) exemption that such portions of Sum A chargeable to Salaries Tax were derived from services rendered in Country B. Hence, the Taxpayer is not qualified for exemption under section 8(1A)(c).

## **F. CONCLUSION**

49. In an appeal of this nature, IRO section 68(4) places on the Taxpayer the burden of proving that the assessment appealed against is excessive or incorrect. For the reasons explained above, we are of the view that the Taxpayer has failed to discharge his burden of showing that the Subject Assessment is excessive or incorrect. We, therefore, dismiss the appeal.